

THE HONORABLE JAMES L. ROBERT

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BOMBARDIER INC.,

Plaintiff,

v.

MITSUBISHI AIRCRAFT  
CORPORATION, MITSUBISHI  
AIRCRAFT CORPORATION AMERICA  
INC., et al.,

Defendants.

No. 2:18-cv-1543 JLR

DEFENDANT MITSUBISHI AIRCRAFT  
CORPORATION AMERICA, INC.'S  
REPLY IN SUPPORT OF ITS MOTION TO  
FILE UNDER SEAL ITS OPPOSITION TO  
BOMBARDIER'S MOTION FOR  
PRELIMINARY INJUNCTION AND  
SUPPORTING MATERIALS THERETO

NOTE ON MOTION CALENDAR:  
Friday, January 18, 2019

This briefing was caused by Bombardier taking the extraordinary position that the majority of evidence supporting MITAC America’s opposition to Bombardier’s requested preliminary injunction—*consisting of admittedly public documents*—needed to be sealed. That robust evidence countering Bombardier’s public accusations of theft and trade secret misappropriation, filed under seal on December 27, 2018, remains hidden from the public to this day. Bombardier has withdrawn some of the inappropriate redactions. But not all. Bombardier’s request that the Court seal hundreds of pages of information readily available on the Internet should be denied because the justification it provides falls far short of the compelling reason required to keep this information secret under Ninth Circuit law and the local rules.

**I. BOMBARDIER ADMITS ITS PURPORTED “TRADE SECRETS” ARE COMPRISED OF PUBLIC INFORMATION.**

As a preliminary matter, and though the case is barely underway, the justification for its request to seal hundreds of pages of public documents exemplifies the shifting-sands approach Bombardier has taken in this case.<sup>1</sup> In response to MITAC America’s strong showing that the purported trade secrets at issue are available publicly, Bombardier concedes it wants public information sealed but justifies its position by contending, for the first time, that its trade secrets are compilations of public information. Bombardier thus essentially *admits* that it seeks to enjoin use of alleged “secrets” that are comprised of public information. (*See, e.g.*, Dkt. 98 at 4 (“Assuming MITAC America’s allegation to be true, filing its papers publicly without redaction would therefore eviscerate any competitive advantage Bombardier could derive from *its compilation of publicly available information.*” (emphasis added))); 5 (“Public disclosure of that information prior to trial will deny Bombardier the opportunity to prove the value derived from keeping that compilation of *publicly available information* secret.” (emphasis added).)<sup>2</sup>

<sup>1</sup> *See, e.g.*, Bombardier’s evolving request for injunction relief (Dkt. 71 at 9; Dkt. 76, Ex. A), moving target number of documents at issue (Dkt. 71 at 1, n.1; Dkt. 76, Ex. C), and new alter ego and vicarious liability theories. (Dkt. 96 at 7-8).

<sup>2</sup> *See also id.* (“The value in Bombardier’s trade secret information lies not only in the proprietary information contained in the documents at issue that are not readily ascertainable by public means, but also in the

1 Merely invoking a theory that its trade secrets are compilations of public information does  
 2 not eliminate Bombardier's burden of establishing a compelling reason for each redaction and each  
 3 document it seeks to file under seal, especially when its requests include hiding admittedly public  
 4 information. Bombardier's inability to demonstrate a compelling need is fatal to its request.

5 **II. BOMBARDIER DISREGARDS THE REQUIREMENTS TO FILE UNDER SEAL,**  
 6 **INCLUDING IDENTIFICATION OF THE UNDERLYING TRADE SECRETS.**

7 Bombardier's argument starts out flawed as it is predicated on the more lenient "good  
 8 cause" standard. (Dkt. 98 at 3.) In fact, the "compelling reasons" standard governs Bombardier's  
 9 attempt to seal the evidence relied on by MITAC America to defend itself against Bombardier's  
 10 request for the extraordinary remedy of a preliminary injunction. *See Ctr. for Auto Safety v.*  
 11 *Chrysler Grp., LLC*, 809 F.3d 1092, 1102 (9th Cir. 2016). "Under this stringent standard, a court  
 12 may seal records only when it finds a compelling reason and articulate[s] the factual basis for its  
 13 ruling, without relying on hypothesis or conjecture." *Id.* at 1096-97 (internal quotation omitted).  
 14 Bombardier presents no evidence of a compelling reason to seal here. Nor could it.

15 Under the relevant rules, Bombardier was required to show for each proposed redaction or  
 16 request to seal a document, "'compelling reasons' sufficient to outweigh the public's interest in  
 17 disclosure," *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006), and  
 18 explain (1) the legitimate private or public interests that warrant the relief sought; (2) the injury  
 19 that will result if relief is not granted; and (3) why a less restrictive alternative to the relief sought  
 20 is not sufficient, LCR 5(g)(3)(B). Bombardier fails on several levels. It starts with Bombardier's  
 21 failure at the outset of this lawsuit to *first* identify *what* in the eleven documents allegedly stolen  
 22 is allegedly a trade secret. Instead, with its Complaint, Bombardier filed these eleven documents  
 23 under seal in their entirety, rather than only *those portions* of those documents that allegedly reflect  
 24 its purported trade secrets (or for which there was another compelling reason to seal). (*See* Dkt. 31  
 25 at 6-7 (MITAC America's Opposition to Bombardier's Motion to Seal the entirety of the

26 fact that certain specified *publicly available information* was used by Bombardier with success for certification  
 purposes.") (emphasis altered).

1 documents purportedly containing the trade secrets).) Despite LCR 5(g)(4)'s requirement to  
2 minimize sealing, Bombardier filed hundreds of pages under seal, including information that it  
3 later admitted was not a trade secret. (*See, e.g.*, Dkt. 99-4 ¶ 30 (Bombardier agreeing to unseal  
4 schematic from Burns Exhibit A).) To this day, Bombardier has still not identified (let alone  
5 proffered any evidence to support) what within the eleven documents it contends is a trade secret.  
6 *See Digital Mentor, Inc. v. Ovivo USA, LLC*, No. C17-1935-RAJ, 2018 WL 6724765, at \*7 (W.D.  
7 Wash. Dec. 21, 2018) (recognizing that plaintiff must sufficiently *identify* alleged trade secrets and  
8 show they exist even under a “compilation” theory).

9 Bombardier now compounds its original error by apparently claiming that any references  
10 to, or evidence that relates to, the subject matter of *anything* in those eleven documents must *also*  
11 be filed under seal. And, when MITAC America pointed out that the eleven documents are full  
12 of public information, Bombardier argued, for the first time in this case, that a compilation of  
13 public information could be a trade secret (still without identifying the supposed compilation  
14 within the eleven documents that it contends is a trade secret). Bombardier cites no law to  
15 support its contention that because it invoked a compilation-of-public-information theory, the  
16 Court must seal hundreds of pages of publicly available documents that simply *relate to*  
17 information in documents that supposedly contain trade secrets. To be clear, Bombardier is  
18 asking to seal public documents that were produced and filed by the party defending itself, not  
19 ones that Bombardier “compiled” (*see, e.g.*, Exs. J, K, O, and T to Boyd Declaration). While  
20 ironically Bombardier suggests the “injury that will result if the relief sought is not granted” is a  
21 potential “slippery slope” whereby MITAC America might “continue its piecemeal disclosures  
22 of Bombardier’s compilation of publicly available information” (Dkt. 98 at 6), the real risk of a  
23 “slippery slope” here is that MITAC America will be forced to defend itself from public  
24 accusations of wrongdoing essentially in private, as Bombardier now apparently contends that  
25 nearly everything in the public domain relating to aircraft performance or certification must be  
26 sealed if it so much as cites an equation or regulation that is in one of the eleven documents.

1 A closer look at the specific information Bombardier wants redacted underscores the  
 2 indefensibility of Bombardier's position and, correspondingly, the lack of a compelling reason to  
 3 seal. Bombardier requests that MITAC America redact sentences from its brief that reference a  
 4 NASA document, a 660-page textbook, and another manufacturer's technical manual. (Dkt. 99-2  
 5 at 4-5.) Bombardier claims that revealing these generic references "would inform the public that  
 6 these texts have information *relied upon successfully by Bombardier to certify its aircraft . . .*"  
 7 (Dkt. 98 at 5-6) (emphasis in original). Bombardier's argument does not pass muster.

8 First, the argument is misleading as it suggests that Bombardier relied upon the NASA  
 9 document and 660-page textbook to certify its aircraft. To the contrary, these references are not  
 10 cited in the eleven documents. Rather, they were identified as relevant by MITAC America's  
 11 experts. To summarize: Bombardier is requesting that the Court order references to public  
 12 documents identified by MITAC America redacted from MITAC America's Response brief  
 13 simply because those references contain information that is allegedly related to the substance of  
 14 the still-unidentified trade secrets, based on Bombardier's unsupported assertion that its  
 15 (unidentified) trade secrets consist of the compilation of (unidentified) public information.<sup>3</sup> This  
 16 proposition is on its face remarkable and, not surprisingly, unsupported by law. Second, and also  
 17 glaring, is the unsupported assumption upon which this argument is premised: that someone  
 18 armed with knowledge of the title of a 660-page textbook or a passing reference to a NASA  
 19 document or another manufacturer's manual could somehow decipher not only what particular  
 20 nuggets within those reference materials were relied on by Bombardier to certify an aircraft, but  
 21 also how it relied on them. Bombardier's argument is not supported by the law or the evidence.

22 For similar reasons, the Court should decline to seal the publicly available Exhibits J, K,  
 23 O, S, and T to the Boyd Declaration and the corresponding references to the exhibits in the

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24 <sup>3</sup> Equally flawed is Bombardier's request to redact the generic reference to another aerospace  
 25 manufacturer's "Technical Manual" in MITAC America's brief, which does not even specify the particular technical  
 26 manual cited in Bombardier's purported trade secret documents. It is also suspicious (and not at all explained) that  
 Bombardier appears to be claiming that another aerospace manufacturer's manual is part of its top-secret  
 "compilation."

1 declaration itself. (*See* Dkt. 99-3 ¶¶ 60, 65d, 67d (Bombardier’s proposed redactions).) These  
 2 exhibits are publicly available documents relating to air-speed calibration and pressure-sensor  
 3 error. It is no secret that the eleven documents touch on these topics; Bombardier’s publicly filed  
 4 Burns Declaration says as much. (*See, e.g.*, Dkt. 5 ¶¶ 11, 16.) Bombardier cites no declaration to  
 5 explain how and why revealing these five exhibits would risk revealing a purported, but  
 6 unidentified, trade secret.<sup>4</sup> Similarly, the fact that Exhibit 7 to the Hansman Declaration discloses  
 7 that Bombardier’s allegedly secret documents comprise information found in textbooks and  
 8 governing regulations is hardly a “compelling reason” to hide Dr. Hansman’s analysis from the  
 9 public.<sup>5</sup> Finally, as to the remaining proposed redactions to MITAC America’s expert  
 10 declarations, Bombardier has not identified what about those proposed redactions might reveal a  
 11 “trade secret,” nor could it until it first identifies the “trade secrets” allegedly being protected.  
 12 Until Bombardier makes the proper showing, the Court should reject all of Bombardier’s  
 13 proposed redactions<sup>6</sup> and require Bombardier to first identify the purported “trade secrets” at  
 14 issue in the eleven documents, and then demonstrate a compelling reason why sealing each  
 15 proposed document and making each proposed redaction is needed to protect such secrets.

### 16 **III. BOMBARDIER’S COMPILATION THEORY IS FUNDAMENTALLY FLAWED.**

17 A final error permeates Bombardier’s entire analysis. While citing cases that stand for the  
 18 uncontroversial proposition that compilations may achieve trade secret status in limited instances  
 19 (*see* Dkt. 98 at 3), Bombardier suggests that mere invocation of a compilation theory satisfies its  
 20 burden. It does not. The word “compilation” is not a talisman that converts any public materials  
 21

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22 <sup>4</sup> Bombardier quotes and cites the Burns Declaration to suggest its trade secrets will be exposed if this  
 23 already publicly available information is made public in this case. (*See* Dkt. 98 at 4 (citing Burns Decl., Dkt. 5  
 24 ¶ 12).) Burns does not support that argument. Rather, Burns only acknowledges two of the documents contain public  
 25 information. (*See id.*) That the previously filed declarations do not support Bombardier’s current position is  
 26 unsurprising given that this is the first instance Bombardier has claimed it has trade secrets consisting of the  
 compilation of public information.

<sup>5</sup> Boyd notes only that Exhibit S is referenced in Bombardier’s purportedly secret documents (Burns Decl.  
 Exs. D and G), but he reveals nothing substantive about the contents of Bombardier’s materials. (*See* Dkt. 77 ¶ 65d.)

<sup>6</sup> To the extent anything is redacted, it should be limited to the experts’ quotations of the content of the  
 eleven documents, and only after the trade secrets in those documents are identified and a compelling need is shown.

1 related to information in a document alleged to contain trade secrets into information that must be  
 2 shielded from the public. These cases—not previously cited in any other Bombardier briefing,  
 3 including its earlier briefing on its first Motion to Seal (*see* Dkts. 3, 37)<sup>7</sup>—merely recognize that a  
 4 “compilation” can be a trade secret. However, they *do not* stand for the proposition that just  
 5 because something is a compilation it is therefore a trade secret. Thus, while the many flaws in  
 6 Bombardier’s new theory are a dispute for another day, Bombardier’s reliance on the theory to  
 7 justify sealing public records here reveals a basic misunderstanding of the theory.

8 If Bombardier wanted to rely on a compilation theory, it needed to support its request to  
 9 seal by showing its supposed compilation of public information is a protectable trade secret,  
 10 including by showing that the compilation is a secret and the information therein is not “‘readily  
 11 ascertainable by proper means from some other source, including the product itself.” *Boeing Co.*  
 12 *v. Sierracin Corp.*, 108 Wash. 2d 38, 49-50 (1987) (quoting RCW 19.108.010(4)(a)). No such  
 13 evidence is present here; rather, the evidence is to the contrary. For example, where Bombardier  
 14 itself has publicly disclosed that some of its purported trade secrets relate to aircraft performance  
 15 calculation methodologies (*see* Dkt. 7 ¶¶ 2-7), it cannot thereafter establish a compelling reason  
 16 to redact MITAC America’s identification of textbooks that discuss methods for calculating  
 17 aircraft performance—references that would be readily available to any person with a library  
 18 card interested in such calculations. *See, e.g., Health Care Mgmt. Consulting, Inc. v. McCombes*,  
 19 661 So. 2d 1223 (Fla. Ct. App. 1995) (holding methodology of interpreting regulations was not  
 20 protectable trade secret because information was “readily ascertainable” through researching the  
 21 Code of Federal Regulations).<sup>8</sup> For these reasons, the requested sealing should be denied.

22  
 23 <sup>7</sup> Bombardier cited *Boeing* at Dkt. 91 at 16, but for its discussion of preemption.

24 <sup>8</sup> The failure to make such a showing is fatal to a compilation theory. *Keystone Fruit Mktg., Inc. v.*  
 25 *Brownfield*, No. CV05-5087-RHW, 2006 WL 1873800, at \*7 (E.D. Wash. 2006) (finding customer list to be  
 26 “readily available” and thus rejecting compilation trade secret theory); *State ex. rel. The Plain Dealer v. Ohio Dept.*  
*of Ins.*, 687 N.E.2d 661, 675 (Ohio 1997) (finding insurer’s compilation was not protectable trade secret where some  
 information might not have been in the “public domain,” but other information in the compilation was); *see also*  
*Cosmopolitan Imports, LLC v. Pac. Funds, LLC*, 145 Wash. App. 1047 (2008) (unpublished) (finding no  
 compilation trade secret where the “underlying information is in the public domain and the end product of the  
 information is unoriginal or may be independently created through proper means, even after much effort . . .”).



1 DATED this 18th day of January 2019.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury that on January 18, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses indicated on the Court's Electronic Mail Notice List.

DATED this 18th day of January 2019.

/s/ Mary Z. Gaston

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